BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RAY M. PAYNE	)	
Claimant	)	
VS.	)	
	)	
COPP TRANSPORTATION	)	
Respondent	)	Docket No. 268,622
	)	
AND	)	
	)	
INSURANCE COMPANY OF THE WEST GROUP	)	
AND COMMERCE AND INDUSTRY INS. CO.	)	
AND CONTINENTAL WESTERN INS. CO.	)	
AND TIG INSURANCE COMPANY	)	
Insurance Carriers	)	

ORDER

Respondent and two of respondent's insurance carriers, Insurance Company of the West Group (West) and Commerce and Industry Insurance Company (Commerce) appealed the June 9, 2003 Preliminary Decision entered by Administrative Law Judge (ALJ) Robert H. Foerschler. [1]

ISSUES

[1] West had the workers compensation insurance coverage for respondent from May 23, 2000 until May 23, 2002. Commerce had the insurance coverage from May 23, 2002 until November 15, 2002 and Continental Western Insurance Company (Continental) had the insurance coverage beginning November 15, 2002 to the present. Before May 23, 2000, TIG Insurance Company (TIG) had the insurance coverage for respondent.

Claimant is an over-the-road truck driver for respondent. This is a claim for a series of accidents and injuries to claimant's shoulders "[f]rom on or about June 29, 1998 and every day worked thereafter[.]" [2]

At the June 5, 2003 preliminary hearing, the only issue before the Judge was which of respondent's insurance carriers was liable for providing treatment for claimant's work-related shoulder injuries. No issue was raised at the preliminary hearing concerning whether those injuries were work-related, or whether claimant suffered personal injury by accident arising out of and in the course of his employment with respondent. For purposes of preliminary hearing, Judge Foerschler determined that respondent and each of respondent's insurance carriers would be mutually responsible for claimant's medical treatment.

Certain of respondent's insurance carriers now contend Judge Foerschler erred in finding the injuries to claimant's shoulders to be work-related. Because this issue was not raised at the preliminary hearing before Judge Foerschler it cannot now be raised for the first time on appeal. In addition, West, TIG, and Commerce argue that claimant sustained a new work-related accident after their coverage ended and therefore, Continental should be liable for claimant's treatment. Continental likewise requests the Board to modify the preliminary hearing order and assess benefits against a different insurance carrier, contending accommodations were made to claimant's job before its period of coverage and that the date of accident would be the date those accommodations were made. [3]

In his brief to the Board, claimant states it is uncontradicted that he developed or aggravated his bilateral shoulder conditions from his work with respondent and that respondent is therefore liable for his medical care. Nevertheless, the issue of compensability was not raised by counsel for respondent nor any of the insurance carriers at the preliminary hearing. And as the ALJ was within his authority to enter the order, "the respondent's insurance carriers are without rights to have filed a request for review." [4]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Board finds and concludes that this appeal should be dismissed.

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[2] K-WC E-1 Amended Application for Hearing (filed March 5, 2003).

[3] *See Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999); *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[4] Brief of Appellee at 3.

At the preliminary hearing, there was no dispute that claimant's present need for medical treatment was the result of an injury or injuries that arose out of and in the course of his employment with respondent. Therefore, that issue will not be considered for the first time on appeal. [5] Accordingly, the sole issue on appeal is which insurance carrier is responsible for the cost of providing medical treatment for claimant's shoulders. This dispute would be resolved by determining the appropriate date of accident. But that is not an issue listed in K.S.A. 44-534a as jurisdictional and does not otherwise raise an issue that the Judge exceeded his jurisdiction. [6] Clearly, the Judge did not exceed his jurisdiction.

> Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly. [7]

The Board is unaware of any provision in the Workers Compensation Act that purports to give the Board jurisdiction to review a preliminary hearing order for redetermining the liability among multiple insurance carriers. The Board was presented with a similar issue in *Ireland*, [8] where, in holding that the Board was without jurisdiction to consider the issue of which insurance carrier should pay for preliminary hearing benefits, the Board said:

> Furthermore, it is inconsistent with the intent of the Workers Compensation Act for a respondent to delay preliminary hearing benefits to an injured employee while its insurance carriers litigate their respective liability. The employee is not concerned with questions concerning this responsibility for payment once the respondent's general liability under the Act has been acknowledged or established. [9]

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[5] *See* K.S.A. 44-555c(a).

[6] K.S.A. 44-551(b)(2)(A); *See Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

[7] *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

[8] *Ireland v. Ireland Court Reporting*, No. 176,441 & 234,974, 2002 WL 985408 (Kan. WCAB. Feb. 1999).

[9] *See Kuhn v. Grant County*, 201 Kan. 163, 439 P.2d 155 (1968); *Hobelman v. Krebs Construction Co.*, 188 Kan. 825, 366 P.2d 270 (1961).

Finally, counsel for the respondent and its insurance carriers contend that the ALJ misunderstood their agreement that Dr. Satterlee be the authorized treating physician to mean that they were also in agreement that they should all share in the costs of that treatment. The ALJ's order does give that impression, although statements made by the Court and counsel at the preliminary hearing clearly reflect that it was understood there was no such agreement. But regardless of the basis for the ALJ's order, he did not exceed his jurisdiction in ordering the insurance carriers to be mutually liable for the medical expenses. If there was a misunderstanding, that can be taken up with the ALJ at another hearing.

WHEREFORE, the Board dismisses the appeal.

IT IS SO ORDERED.

Dated this _____day of September 2003.

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BOARD MEMBER

c: James E. Martin, Attorney for Claimant
Timothy E. Lutz, Attorney for Respondent and Insurance Company of the West
Eric T. Lanham, Attorney for Respondent and Commerce and Industry Ins. Co.
Steven J. Quinn, Attorney for Respondent and Continental Western Ins. Co.
Thomas R. Hill, Attorney for Respondent and TIG Insurance Company
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director